



STATE OF NEW JERSEY

Board of Public Utilities

*Two Gateway Center
Newark, NJ 07102*

TELECOMMUNICATIONS

IN THE MATTER OF THE JOINT)
APPLICATION OF BELL ATLANTIC-)
NEW JERSEY, INC. AND XDSL)
NETWORKS, INC. FOR APPROVAL OF)
AN INTERCONNECTION AGREEMENT)
UNDER SECTION 252 OF THE TELE-)
COMMUNICATIONS ACT OF 1996)

ORDER APPROVING
INTERCONNECTION AGREEMENT

DOCKET NO. TO99090713

(SERVICE LIST ATTACHED)

BY THE BOARD:

By letter dated September 8, 1999, Bell Atlantic-New Jersey, Inc. (BA-NJ), a New Jersey corporation, and xDSL Networks, Inc. (xDSL), a Delaware corporation, (individually, a Party, and jointly, the Parties) pursuant to Section 252(e) of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, (codified in scattered sections of 47 U.S.C. §151 et seq.) (the Act) submitted to the Board of Public Utilities (Board) a joint application (Application) for approval of a certain negotiated interconnection agreement dated as of April 26, 1999 (Agreement). xDSL was granted authority by the Board to provide local exchange and interexchange service on August 4, 1999. See, Order of Approval, I/M/O Petition of xDSL for the Authority to Provide Local Exchange Telecommunications Services, Docket No. TE99020059. xDSL is a local exchange carrier (LEC) as defined by the Act. See 47 U.S.C. §153(26). BA-NJ is an incumbent local exchange carrier as defined by the Act with the duty to negotiate interconnection agreements pursuant to Section 252 of the Act. See 47 U.S.C. §251(c) and §251(h)(1). The Agreement contains various rates, terms and conditions of interconnection of the networks of xDSL and BA-NJ which are necessary for xDSL to begin to offer local telecommunications services within New Jersey.

BA-NJ and xDSL assert that the Agreement satisfies the requirements for Board approval because it does not discriminate against any other telecommunications carrier, as required by Section 252(e)(2)(A)(i). The Parties aver that the interconnection arrangement contained in the Agreement is available to any other telecommunications carrier operating in New Jersey, and that other carriers are not bound by the Agreement, remaining free to negotiate independently with BA-NJ pursuant to Section 252 of the Act. Application at 3-4.

Moreover, the Parties state that the Agreement is consistent with the public interest, convenience, and necessity, as required by Section 252(e)(2)(A)(ii), because it is an important step towards allowing xDSL to compete with BA-NJ as a facilities based carrier in New Jersey for both residential and business customers. Ibid.

The Agreement sets forth the terms, conditions and prices under which BA-NJ will offer and provide access to unbundled network elements, ancillary services, and wholesale telecommunications services available for resale to xDSL within each local access and transport area (LATA) in which they both operate in New Jersey. The Parties assert that the Agreement is an integrated package that reflects a negotiated balance of many interests and concerns critical to both Parties. Ibid. Exhibit A to the Agreement sets forth a detailed schedule of itemized charges. Exhibit B to the Agreement sets forth a methodology by which xDSL may present a network element bona fide request to BA-NJ, as well as the duties of both Parties should such a network element bona fide request be made.

The Agreement is in effect until March 15, 2001, and thereafter the Agreement shall continue in full force and effect unless terminated as provided within this Agreement. Upon the expiration of the initial term, the Parties will negotiate in good faith to maintain interconnection, collocation, and the exchange of traffic, including the use of mediation or arbitration under Section 252 of the Act. However, in the absence of agreement to renew or extend this Agreement, either Party may terminate by providing written notice to the other Party at least ninety days in advance of the termination. In the event of such termination, those service arrangements made available under this agreement and existing at the time of termination shall continue without interruption under (a) a new agreement executed by the Parties, (b) standard interconnection terms and conditions made generally effective by the Board, (c) tariff terms and conditions generally available to competitive LECs (CLECs), or (d) if none of the above is available, under the terms of this agreement on a month to month basis until such time as (a), (b), or (c) becomes available.

As stated in the Application, the Parties maintain that the Agreement does not discriminate against any other telecommunications carrier, and that, to the contrary, the arrangement contained in the Agreement is available to any other carrier authorized to operate in New Jersey. The Parties also assert that other carriers are not bound by the Agreement and remain free to negotiate independently with BA-NJ pursuant to Section 252 of the Act. In addition, the Parties assert that the Agreement is consistent with the public interest, convenience and necessity, as required by Section 252(e)(2)(a)(ii) because it is an important step towards allowing xDSL to compete with BA-NJ as a facilities-based carrier in New Jersey, and that the Agreement will also be available to all telecommunications carriers under 47 U.S.C. §252(i).

By letter dated November 12, 1999, the Division of the Ratepayer Advocate (Advocate) stated that it is satisfied the Agreement does not discriminate against other carriers and is consistent with the public interest, convenience and necessity, and therefore recommended that the Board approve the Agreement. In addition, although the Advocate acknowledged that the terms of the Agreement on their face meet the requirements of the Act, it urged the Board to make a specific finding that approval of the agreement does not constitute a determination concerning BA-NJ's obligations pursuant to Section 271 of the Act and that any determination respecting BA-NJ's satisfaction of the requirements set forth in Section 271 must be made only following formal proceedings before the Board.

DISCUSSION

Pursuant to 47 U.S.C. §252(a)(1), an incumbent LEC may negotiate and enter into a binding interconnection agreement with a carrier requesting interconnection, service or network elements without regard to the standards set forth in 47 U.S.C. §251(b) and (c). In addition, 47 U.S.C. §252(e)(1) requires approval by the Board of any interconnection agreement adopted by negotiation or arbitration, and further requires the Board to approve or reject the Agreement, with written findings as to any deficiencies. The Act provides that the Board may reject a negotiated agreement only if finds that:

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

[47 U.S.C. §252(e)(2)(A)].

The Board's review of the Agreement and the record in this matter indicates that the Agreement is consistent with the public interest, convenience and necessity, and that the Agreement does not discriminate against telecommunications carriers not parties to the Agreement. Therefore, the Board FINDS that the Agreement meets the standards set forth in the Act, and HEREBY APPROVES this Agreement as presented by the Parties. This approval should not be construed as preapproval of any future petitions for rate recovery of costs incurred pursuant to the Agreement. Our approval does not constitute a determination concerning BA-NJ's obligations pursuant to Section 271 of the Act, although this Agreement will be taken into consideration in that determination. In addition, our approval does not constitute a determination concerning, nor shall the Board be bound by, provisions within this Agreement regarding the confidentiality of information.

With regard to the "pick and choose" rule, we note that the Eighth Circuit's decision regarding the "pick and choose" rule, 47 C.F.R. §51.809, was reversed by the Supreme Court and the rule was reinstated. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 738, 142 L.Ed. 2d 835 (1999). In prior Orders, we have noted the importance of our interpretation of 47 U.S.C. §252(i) with regard to the State's local competition marketplace, and have reserved the right to reconsider our interpretation of the "pick and choose" rule and Section 252(i) upon the conclusion of the Supreme Court's review of the Eighth Circuit Decision. We therefore note that the Supreme Court has now acted, and its decision in AT&T Corp. v. Iowa Utils. Bd. regarding the "pick and choose" rule governs.

With regard to the Agreement's provision at paragraph 28.3 that "minimum revisions [to the Agreement which are necessary to eliminate inconsistencies with FCC regulations] shall not be considered material, and shall not require further Board approval (beyond any Board approval required under Section 252(e) of the Act)," the Board notes that it has previously stated in its Orders that amendments or

modifications to Board approved interconnection agreements are also subject to Board review and approval. It is difficult for the Board to accept a broad assertion that modifications to interconnection agreements that correct inconsistencies with FCC regulations are not, or may not be, material. Certainly, no agreement can be read, nor does the Board believe the Parties to this Agreement intend that it be read, to limit the authority of the Board under Section 252(e) of the Act to review interconnection agreements. Accordingly, until and unless otherwise provided by the Board, subsequent amendments or modifications to the Agreement approved herein shall be subject to review and approval by the Board.

Pursuant to 47 U.S.C. §252(h) of the Act, a copy of the Agreement will be made available for public inspection and copying within ten days of the issuance of this Order.

DATED: March 29, 2000

BOARD OF PUBLIC UTILITIES
BY:

(signed)
HERBERT H. TATE
PRESIDENT

(signed)
CARMEN J. ARMENTI
COMMISSIONER

(signed)
FREDERICK F. BUTLER
COMMISSIONER

ATTEST

:
(signed)
EDWARD D. BESLOW
ACTING BOARD SECRETARY